UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO, CALIFORNIA

WASTE MANAGEMENT OF ARIZONA, INC., d/b/a WASTE MANAGEMENT OF TUCSON

and

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 99

Cases 28–CA–21988
28–CA–22240
28–CA–22296

William Mabry III, Phoenix, Arizona, for the General Counsel.

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DECISION

Statement of the Case

JAMES M. KENNEDY, **Administrative Law Judge**: This case was tried in Tucson, Arizona over 9 hearing days between April 14 and June 17, 2009 based upon a second consolidated complaint issued February 25, 2009 by the Regional Director for Region 28. The complaint is based upon unfair labor practice charges filed on June 24, November 21 and December 31, 2008 [1] by United Food and Commercial Workers Union, Local 99 (the Union or the Charging Party). Some of the charges were amended prior to the issuance of the complaint. The complaint alleges that Waste Management of Arizona, Inc., dba Waste Management of Tucson (Respondent) committed certain violations of §§8(a)(5), (4), (3) and (1) of the National Labor Relations Act. Respondent denies the allegations in their entirety. All parties have filed post-hearing briefs and they have been carefully considered.

Issues

The facts of this case arise from the aftermath of a decertification effort begun in January. [2] An election was conducted February 20. The Union did not prevail at the polls and it filed objections to the outcome of the election. A 16-day hearing was conducted concerning

[1] All dates are 2008 unless stated otherwise.

[2] This was the third effort in 3 years. The first was an effort begun in January 2006, ending in an election the Union won. The second began in January 2007, but the petition was administratively dismissed.

those objections. Evidence presented at that hearing ultimately resulted in an agreement to set aside the election and conduct a second election. Approximately 28 witnesses testified, including three drivers who were subsequently discharged and whose dismissal is the subject of this complaint. All three were alleged to have been discharged in violation of §8(a)(3) [3] because of their union activities and §8(a)(4) [4] because they gave testimony before the Board in the post-election hearing. Running in parallel, the Union filed grievances under the (extended) collective bargaining contract alleging that all three had not been fired for good cause. Two of the grievances, those involving employees José Gonzalez [5] and Victor Grijalva, were processed together resulting in an arbitral decision. [6] The third grievance, on behalf of employee Eliseo Melendrez, was processed to arbitration separately. [7] At the time of this writing, I am unaware of the results of that proceeding, if any. Nevertheless, the Union filed §8(a)(5) charges prior to that matter going to hearing on the ground that Respondent failed to comply with and/or was unreasonably late in responding to an information request made on November 26 concerning factual matters relating to Melendrez' discharge.

Jurisdiction

Respondent admits it is a California corporation with an office and principal place of business in Maricopa County, Arizona from which it directs operations at various locations throughout Arizona, including Tucson and Pima County. It is in the business of providing comprehensive waste management to municipal, commercial, industrial and residential customers. It further admits that it is an employer engaged in interstate commerce within the meaning of §2(2), (3) and (6) of the Act as its gross revenues exceed $500,000 and it has purchased goods valued in excess of $50,000 from sources outside Arizona. Finally, it admits the Charging Party is a labor organization within the meaning of §2(5) of the Act.

Background

Since 1995, the Union has represented Respondent's employees in an appropriate bargaining unit comprised of its drivers and helpers who are employed at its plant on West Ina Road northwest of Tucson. That representation has resulted in a series of collective bargaining contracts, the last of which was effective through March 31. On April 3, Respondent and the

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[3] §8(a)(3) of the Act states in pertinent part: "It shall be an unfair labor practice for an employer — by discrimination in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage union membership in any labor organization. . . . "

[4] §8(a)(4) states that it is an unfair labor practice "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;. . . "

[5] Gonzalez' last name is sometimes misspelled in the transcript as 'Gonsalas.' He testified through an interpreter who may have made the original error.

[6] On August 20, 2009, the Union, Grijalva and Respondent reached a private settlement. Thereafter, on September 22, 2009, the Charging Party filed a motion to withdraw that portion of the unfair labor practice charge relating to Grijalva in Case 28–CA–21988 and to dismiss the corresponding portion of the complaint. No opposition was filed to that motion and on October 19, 2009 I approved the withdrawal and granted the motion. As a result, the only remaining portion of that charge is the allegation concerning José Gonzalez.

[7] The Regional Director, presumably following the mandate of the Board in *Filmation Associates*, 227 NLRB 1721 (1977), declined to defer to the arbitration process due to the §8(a)(4) allegations. See also, *Equitable Gas Co.*, 303 NLRB 925 (1991), enfd. in pertinent part, 966 F.2d 861 (4th Cir. 1992). No party has moved for deferral.

Union signed an agreement extending the contract up through the date of the second election, which has yet to be scheduled as it awaits the outcome of this case. [8]

Eliseo Melendrez

I begin with Eliseo Melendrez even though his discharge followed that of José Gonzalez (and Victor Grijalva). His §7 activities, both against and for the Union reach back to the 2006 effort to decertify. He is an able employee leader who once opposed continued unionization and later favored it, eventually becoming a union steward in February 2006 after the first decertification election failed. This history lends a sense of why Respondent behaved toward him as it did.

Melendrez became a driver for Respondent at its West Ina Road operation in November 2000. He was discharged on November 5. During his employment he served first as a residential recycle driver, but for the past several years he has been a side load truck driver handling residential waste. That type of truck utilizes mechanical arms to pick up and dump waste containers (called totes, bins or cans) from curbside. The driver normally never leaves his vehicle. Melendrez' routes were all residential and he serviced a different route each day. The number of customers on residential routes varies from about 650 to perhaps 1500 stops. [9]

In this area, mostly unincorporated Pima County northwest of the Tucson city limits, Respondent contracts with individuals for waste pickup service, not municipalities. It serves customers in towns such as Marana and Oro Valley as well as some named subdivisions, such as Meadowbrook, Saddlebrook and Mesa Planned Community. The City of Tucson has its own trash and waste operation, while other parts of Pima County are served by Respondent and at least two competitors. [10] It is not clear from this record (though the number could be found in the representation case were it before me) exactly how many drivers work from the Ina Road yard. It seems to be in the neighborhood of 130, comprising residential, commercial, industrial and port-o-let operators.

In 2006 Melendrez became disenchanted with the quality of the Union's representation. He knew one of the stewards was about to retire and who had said he no longer had any interest in doing a good job. As a result, Melendrez became one of the leaders who supported the election effort. He gathered most of the signatures necessary to support the decertification petition. During the course of that campaign he had several conversations with Respondent's district manager, Aubrey Waingrow. He recalls that he asked Waingrow what the Company could do for the employees if they got rid of the Union and that Waingrow had responded by promising to get him a pay stub showing that nonunion employees received superior insurance. The pay stub was never provided and Melendrez began to harbor doubts about Waingrow's forthrightness. As the campaign progressed, Melendrez found himself attending a number of Union meetings during which he realized that management had not been giving him and the other employees correct information. As a result, he changed his mind about ousting the Union, and instead began campaigning to keep it. The election favored continued Union representation, but Melendrez remained unhappy with the quality of work being performed by

[8] In addition, there is testimony that an unfair labor practice charge was settled contemporaneously with the agreement to run the second election.

[9] For example, driver Gustavo Rubio's residential routes varied from 980 to 1500, depending on the day of the week.

[10] Respondent also operates a second facility on Old Vail Road southeast of Tucson, known as the South Yard, to cover customers in that territory. The two yards are about 25 miles apart.

the stewards. His election efforts had galvanized him into making unionization work, so he sought and became a union steward, a responsibility he continued to hold until he was discharged in 2008.

I think it is fair to say that his turnaround was visible to management and that it could not have been met favorably. Among other things, Melendrez' leadership capabilities were strong enough first to persuade employees to seek decertification and then, when determining that he had misunderstood (or had been misled), he was strong enough to not only change his own mind, but the minds of many other employees. His integrity and personal authority on the issues took him to a leadership position – a stewardship which he took seriously. Indeed, at one point Waingrow admitted that Melendrez, as steward, was one of the principal union leaders. (He also mentioned Zacharias Alvillar, another steward.) [11]

When the 2008 decertification election petition, filed by an employee named Ed French, began heading toward an election, Melendrez could be seen actively discussing the matter with Union officials and fellow employees. In addition, he attended a number of employer-sponsored meetings. During those meetings he challenged the veracity of both Waingrow and the professional 'persuaders' who Respondent had called to present its arguments against continued union representation. Prior to such a meeting on February 14, the opponent, Jim Clement from corporate legal in Houston, had a pre-meeting conversation with Melendrez. During their conversation, Melendrez told Clement he was in possession of a paystub from one of the nonunion competitors in the county, Saguaro [Environmental Services], and intended to show it at the meeting to demonstrate what nonunion companies actually charged their employees for health care insurance in order to compare it with what Respondent paid under the Union's contract. Clement could not permit that and barred Melendrez from the meeting. The explanation, exaggerated, was that Melendrez intended to 'disrupt' the meeting, though that should more accurately be described as 'debating' the issue. [12] Waingrow admitted he had never before banned an employee from a meeting about the Union. One may well ask if Waingrow would have done so absent Clement's intervention. One thing is certain, through this incident corporate headquarters in Houston had become acutely aware of Melendrez and the strength of his pro-union attitude.

Matters came to a boil after the election when, during the post-election hearing on the Union's objections, Melendrez (as well as Gonzalez and Grijalva) testified in support of the Union's contentions that Respondent had engaged in conduct affecting the outcome of the election. The principal point here is that Company officials had given some testimony denying the conduct, but Melendrez had recorded the event in question (a February 18 pro-decertification presentation by Clements and Waingrow) with a pocket tape recorder and presented that evidence at the hearing. Not only did it demonstrate the truth of the Union's objections, it cast Waingrow and perhaps Clements as distorting the truth. [13] Indeed, during the presentation Melendrez had challenged the accuracy of the various insurance comparisons Clements offered and questioned Waingrow's veracity over his accusation that union official

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[11] Alvillar's name is frequently misspelled in the transcript as 'Avelar.'

[12] Barring an opponent from a campaign meeting is not unlawful in and of itself. *Mueller Brass Co*., 220 NLRB 1127, 1138-1139 (1979). See also the cases cited at 1139 fn. 10, *Spartus Corp*., 195 NLRB 134, 141 (1972), and *Luxuray of New York*, 185 NLRB 100, fn. 1 (1970). Cf., *Professional and Clerical Employees Div., Teamsters Union Local 856 (Holiday Inn of Palo Alto-Stanford)*, 302 NLRB 572 (1991).

[13] Clements did not testify in this proceeding. This record does not show whether Clements testified in the post-election hearing.

Hernandez had both assaulted him at the office [14] and had threatened his 15-year-old daughter at his Phoenix-area home. [15]

Melendrez also recorded that Waingrow had said he would remove a fence which 2-1/2 weeks earlier had been constructed at the Ina Road yard if the employees voted 'no.' The fence issue was connected to claims of strikes, lockouts and protection – issues which had been raised by the Company, not the Union. Apparently the fence was to serve both as a bar to inhibit union representatives from talking to unit employees and as a subtle threat of a lockout. Waingrow is said to have claimed it was for the protection of the people who work in the office. Melendrez, during the post-election hearing testified that Waingrow had said "It's a shame you have Union talking about lockouts." Melendrez believed no Union official had ever made such an accusation, so Waingrow's remark made an impression. [16] (The remark's purpose, then, was something on the order of *"If there is no union, we won't have to lock you out and the office will be safe, so we can take the fence down."*)

José Gonzalez, like Melendrez, also gave testimony during the post-election hearing about Respondent's pre-election conduct. From a sequential standpoint, his testimony could be described here. However, as his discharge is discrete from Melendrez,' I shall insert it the discussion relating to him.

As noted, the election was held on February 20. The collective bargaining contract was not scheduled to expire until March 31 no matter what the election's outcome was to be. And, of course, the first objections were filed on February 26. The hearing on the objections was promptly noticed and it opened on March 12. Still, it took 16 days of hearing before the parties stipulated to a re-run on April 3. By then the collective bargaining contract had ended and something was needed to replace it, so simultaneously, on April 3, the extension agreement was signed and some unfair labor practice charges were settled. The Union remained in business. Melendrez was still the steward and found himself in the middle of some ongoing employment controversies.

On June 9, Respondent discharged Gonzalez (as well as Grijalva) after a supposedly tardy report of an extremely minor traffic incident. Melendrez, as the steward, served as Gonzalez' union representative during his meeting with several managers and supervisors that day. That meeting resulted in Gonzalez' suspension prior to his discharge. During the meeting Melendrez, on Gonzalez' behalf, asked Waingrow if the automobile driver had reported the

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[14] The incident, mostly talk, had arisen from Respondent's banning Melendrez from the February 14 meeting. Hernandez apparently was expressing his displeasure over the bar.

[15] Waingrow's contention that Hernandez assaulted him at the office is of dubious validity as a criminal act. He says Hernandez 'pushed him out of the way with his arm,' later acknowledging that it was an emotional moment. As for the threat to his daughter, he now acknowledges that it was not overt, saying someone knocked on his door and gave her a note to give him. He did not retain the document. He has no idea of the identity of the person at the door. Even so, he claimed the incident forced him to arrange for (off-duty) police protection. There is reason to doubt the incident entirely or that it even involved a union agent of some kind. He, nevertheless, used it to claim victimhood to the staff for partisan purposes — essentially claiming that the Union resorts to intimidation, suggesting to the staff that it should not want to associate with a group that relies on frightening children.

[16] The probability of an actual lockout during a decertification process is extremely low. Melendrez' testimony about Waingrow's remark, if credited, would mean that Waingrow was injecting a fear of wage loss into the process, a fear fabricated for the campaign.

incident to the Company. Waingrow responded 'not yet, but they will.' Despite Waingrow's confidence, the other driver never did report it to the Company. Melendrez did not play a role when the Union represented Gonzalez at the later meeting shortly before Gonzalez was discharged.

On September 30, Melendrez faced off with operations manager Kevin Doyle over a truck release form which driver Francisco Jesús Yepiz was refusing to sign since he believed the truck was unsafe. Melendrez describes the exchange:

> [I told Doyle] [t]hat Francisco was not going to sign until he removed that because it was impossible for the truck to have gone backwards. And he asked me if I was calling him a liar. And I told him no but that that was impossible and he told me not to -- to mind my own business, that it had nothing to do with me…To not get involved in that, that that was not my business, just to worry about myself.
>
> And I told him that, yes, it was my business, that any of the problems with the drivers was my business and that was why I was the Union steward.

As Melendrez describes it, both of them were forceful in what they said to each other. Melendrez said Doyle was 'aggressive;' Melendrez' own tone shows he responded in kind. After the exchange, Doyle spun and stalked off.

Melendrez testified that during that summer and fall he represented two employees in addition to those already mentioned. They were Grijalva, for whom he served in the same capacity as he had for Gonzalez, and Juan Zarate. [17] Zarate had been fired and had later prevailed through arbitration. Melendrez had assisted him during the reinstatement process.

Curiously, on October 16, when corporate security director Kris Spilsbury wanted to interview Melendrez, Waingrow and Don Ross, Melendrez' direct supervisor, seemed to have led Melendrez to believe he was needed at the office to assist Zarate. Instead, he was sent to Spilsbury.

The Spilsbury interview was preceded by a cascade of events which were entirely unknown to Melendrez. They began with an anonymous report from Respondent's Phoenix office that someone had called a customer service number and had reported that on July 10 at 7:01 a.m., a driver had left his truck and was talking to his neighbor at an address on Via del Santo. That residence is the home of KB, [18] a 29-year-old single mother of a school-aged child.

The report, entered on Respondent's computer network, known as MAS, reads:

> Neighbor of [redacted house number] Via del Santo W Tucson said our driver of truck number 100456 is not in the truck and it is just idling and he keeps running to and from the truck talking to a person at this address. Neighbor said there is no svc today. Doesn't know why he is there. Please have him move on. Thx.

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[17] Misspelled Cerate in the transcript.

[18] Although this person's name is used in both the transcript and the briefs, I deem it appropriate to use only her initials, given the nature of Spilsbury's accusations against her. She did not testify and has been given no opportunity to provide evidence which may or may not have refuted Spilsbury's conclusions. There is no need for me or the Board to compound the problem.

Although Melendrez' supervisor Don Ross received the 'ticket' on Saturday, July 12, he decided he would not investigate it right away. He did testify that he intended to do so the following Thursday. It is true that he knew or could easily have determined, from the truck number (and the address) that the driver was Melendrez. Yet, at least one thing in the report made no sense – the claim that there was no service on the day of the report, July 10. That was a Thursday and that was the day for Melendrez to run the route which included Via del Santo. Indeed, the complaint seems silly on its face; no doubt Ross thought so, too. It could be regarded an entirely innocent customer satisfaction matter of some sort. For drivers to do such things is in Respondent's interest and they are encouraged to keep customers happy. I find, despite Ross's testimony, that he never intended to investigate it the following week. He had decided to disregard the matter as trivial. Indeed, if he intended to do anything at all about it, he would have asked Melendrez directly on Monday. He did not do that either.

On July 12, however, a second complaint was telephoned to the Phoenix customer service number. That generated a second MAS 'ticket,' much more detailed than the first:

> Customer: [account number] KB
> [redacted house number] Via del Santo W
> …Neighbors John and other neighbors are stating that this 29 year old lady is getting the driver to get out of his truck every single Thursday…Getting her trash bin out of her back yard..svc it and putting the bin back in her back yard…Then leaves the truck running in front of the house for 10-15 minutes every single Thursday while driver is in the house…This accnt is closed and should not be svc Any reason why driver is in this lady's house??? Neighbors are going to start putting this on tape…The noise of the truck idling and the fumes from Truck #100456 is getting too much for the neighbors. Please can we resolve…This is not the first time the neighbors are calling about this.

Ross recognized that the second complaint involved the same sort of thing from the previous week. He could also see that it showed an account number and a street address which had not been on the first ticket. In addition, it said that the account at that address had been closed. At this point he knew the complaints referred to Melendrez. Being more accusational, this ticket demanded more attention than the previous complaint and Ross testified he intended to investigate it that afternoon, but something came up, so later that day he turned both complaints over to Waingrow. Ross said after he gave the tickets to Waingrow, he played no further role in what happened to Melendrez. He did say that Waingrow taking over the investigation was somewhat out of the ordinary. Usually, it seems, Waingrow would want to remain informed, but would not do the investigation himself. This exceeded what Ross had seen in the past. He says Waingrow did tell him to go to the house to see if one of Respondent's waste containers was on site. A week later, possibly July 24, Ross did so and returned with a photograph of a Waste Management toter in front of KB's house.

As things stood on July 17, however, Ross said he had never seen an investigation given to corporate security before, but that, as will be seen, is what Waingrow did.

Aside from having Ross check the house, Waingrow did not ask Ross to pursue the matter any further. This meant he did not ask Ross to speak to Melendrez about what he was doing at the Via del Santo location nor did he call Melendrez in himself. I find it quite odd that a manager would not speak to the employee as a first step in responding to a complaint.

But what Waingrow did instead is even odder. Within a day or so he telephoned Kris Spilsbury, the security director for Waste Management's Western Group. Spilsbury is stationed in the Phoenix area and has security responsibilities in Tucson. (The two cities are

approximately 110 miles apart.) He told Spilsbury something which is not clear in the record, but it caused Spilsbury to begin an investigation. Spilsbury said Waingrow wanted him to investigate whether Melendrez was going into the lady's house, whether he was spending time idling in front of it and why he was going into the backyard to get the trash. On July 24, Waingrow e-mailed Spilsbury attaching the second complaint and saying that Melendrez would be on the route the following week. Spilsbury asked Waingrow for the neighbor's identity and on July 25 hired a Tucson private investigator, Dean Lundquist, to perform some video surveillance of the address the next time Melendrez ran the route.

Lundquist contacted the neighbor, John Matlock (the 'John' who had made the complaint), and arranged to use Matlock's property for his surveillance of the trash service at KB's house.

Lundquist's first video was on July 31. From a hidden vantage point he video-camera shot Melendrez as he serviced the house in question. The video shows that at 8:02 a.m., Melendrez stopped his truck at that address, walked to the carport where he grabbed a waste bin and pulled it to the truck where he emptied it. He left the container at curbside and continued on his route. The video also shows that KB's car was in the carport at the time of the pickup, suggesting that she was at home. Melendrez spent less than a minute at that stop.

A few minutes later, Matlock informed Lundquist that the driver was not the same one he had reported. He told Lundquist he should be looking for a young, clean-cut Hispanic male. The next day, Spilsbury e-mailed Waingrow a summary of what Lundquist had seen. He said "…the driver went into the yard, and pulled out the can, dumped it and returned it to the back yard." A review of the video shows that Spilsbury erred when he reported that the driver had returned the can to the backyard; in fact it was left at streetside. Indeed, during his testimony, Spilsbury continued to insist that the driver had returned the bin to the backyard.

Lundquist's written report to Spilsbury simply says: "8:02 AM: The driven (sic) exits vehicle and walks to the car port, takes the garbage container to the truck and empties it, then returns to the truck and drives away." He does not use the word 'yard' at all; nor does he report that the driver did not enter the house. The errors are not Lundquist's, but Spilsbury's.

Spilsbury asked Waingrow to clarify the identity of the driver and Waingrow responded that it was "Same driver as always. We had no changes this week. Last week we had a relief driver on route and the container was out on the curb." [19]

Because they had not seen anything particularly untoward, Waingrow and Spilsbury decided to perform a second video surveillance. Once again, Spilsbury hired Lundquist. A second video surveillance was performed on August 14. At 7:31 a.m., Melendrez arrives at the

[19] Waingrow's response, that another driver had been on the route for July 24 raises several questions. The first is how and why Waingrow knows that the can had been picked up from curbside that day by the relief driver? That was the same day he had provided the second complaint to Spilsbury. Second, if the customer was not a current customer, why did the relief driver service the address? Or at least why did he not put the can into the truck? (Testimony shows that it is Respondent's common practice to dispose of such cans in that fashion.) Had Waingrow given the relief driver specific instructions about that house? If so, what were the instructions? Finally, once he learned that the toter was at curbside that day, why didn't he simply tell Melendrez the following week not to service it any more? Instead, Waingrow referred the matter to Spilsbury.

address. The bin is at the curb and he uses the mechanical arm to pick it up and dump it into the truck. He is at the house for less than 15 seconds. Lundquist stays for a few moments and then video records KB and her child come from the house, enter the car and then leave at 7:32 a.m., after Melendrez had continued on his route. Neither seemed to show any interest in the near-encounter.

On August 16 (Saturday), Lundquist reported that at 7:31 a.m., Melendrez had picked up the garbage can at the curb, emptied it and had driven off. He also reported the woman's departure with her child a minute later. Spilsbury promptly told Waingrow: "We did it again. Same result. He just picked up the trash and nothing more was done."

The evidence is not entirely clear what process or logic Waingrow/Spilsbury followed, but they decided to do it once more. Another surveillance was arranged for Thursday, September 4, but was called off due to an industrial injury which had befallen Melendrez.

Subsequently, Melendrez returned to work and on September 12, Spilsbury asked Waingrow if Melendrez would be at work that Thursday. Waingrow replied affirmatively. Lundquist was notified and set it up.

Lundquist's September 18 video shows KB's house at 7:03 a.m., with the bin still next to the carport. He films nothing until KB and her child drive off at 7:36 a.m. At 7:41, Melendrez passes the house, servicing the opposite side of the street. At 7:43, Lundquist's camera, following the truck's path, shows KB's garbage can at the curb. He never filmed her moving the bin from the carport to the street; it must have been placed there sometime prior to her departure at 7:36. At 7:44, Melendrez can be seen, still on the opposite side, out of the truck, righting a toter which had fallen over after being dumped. He then moves on down the street. Within that same minute, KB returns to the house without the child and re-enters, leaving her keys in the front door. At 7:46:50, she leaves again, and after locking the house, heads away from the direction taken by the truck. At 7:49:17, Melendrez stops at her toter. Lundquist does not photograph the dumping process and begins again at 7:49:24 as the truck moves to the house where Lundquist is situated. Lundquist's report is brief: "7:46 AM: Video taken of woman leaving. 7:49 AM: Video taken of WM truck arriving at target residence, picking up garbage at the curb without exiting truck, and then driving away."

Curiously, there was no e-mail exchange between Spilsbury and Waingrow following the September 18 observation. Spilsbury testified that they probably spoke by telephone but claims no real recollection of doing so. Spilsbury said that copies of each of the videos were provided to Waingrow for his review.

At this stage, Waingrow should have realized he had observed nothing that he did not already know. He knew KB was some sort of delinquent account, a fact he knew from the second complaint ticket of July 12. Beyond that, nothing of the second complaint ticket had been confirmed. Aside from Melendrez pulling the toter from the carport (and wheeling it about 30 feet to the truck), he had seen nothing else. On the other occasions, the toter was at curbside in time for the pickup and Melendrez had made routine, automatic pickups without leaving his cab. Plus, when the relief driver had been on the route, the bin was at streetside. No evidence was discovered that Melendrez had any special interest in KB. That meant there was only the concern about why KB had a bin and why the driver was servicing her account.

A review of the notes connected to KB's account shows what probably happened. Months before, on November 26, 2007, KB's account was cut off due to non-payment and service was suspended December 4, 2007. It appears, according to an account record, that

Respondent gave its container delivery/removal contractor, Doran Enterprises, an instruction on December 27, 2007 to pick up KB's bin. An entry shows that the task was completed on January 11, 2008. Since she continued to be in possession of both a Waste Management garbage bin and a Waste Management recycle container throughout 2008, it seems likely that the contractor never picked it up, despite the instruction and the record that it had done so. Respondent pays Doran based on what Doran says it has done, but Respondent does not actually oversee whether Doran picks bins up as instructed. (There is oversight on deliveries of cans to new customers, because the customer will complain if it is not delivered. Yet, complaints would be rare if the toter were not collected when a customer was canceled.) In fact, Doran knows that Respondent often instructs drivers to throw the cans of delinquent clients into the truck's hopper. [20] As a result, Doran has no real incentive to actually pick up containers at residences where the account has been closed by Respondent. I therefore find that KB's garbage can was never picked up in January, despite Respondent's belief that Doran had done so.

On October 17, after being called to the office on a ruse (he was said to have been called as the steward to assist Zarate in his transition back to the job), Melendrez found he was to be interviewed by Spilsbury. Spilsbury's report about the interview is in evidence as GCExh. 9. Unknown to Spilsbury, Melendrez made a recording of most of the interview with a voice-activated portable recorder which he had in his pocket. At one point the tape ran out on the first side of the cassette and a gap results. Melendrez later took advantage of a short intermission to turn the tape over. Aside from the gap, there is no evidence that the tape was edited. [21]

A review of Spilsbury's report against the transcript rather quickly reveals that the report contains a great deal of characterization and on a number of points the report is inconsistent with the transcript. The first example is in Spilsbury's first paragraph. There he says "After being advised of the purpose of the interview, Melendrez provided the following information…." The transcript contradicts that assertion for Spilsbury never advised Melendrez of the purpose of the interview. He just introduces himself as the security director for the western region, and then starts with his questions concerning Melendrez' personal information. After that, he goes directly to how a driver learns that "a customer is no longer a customer," the subject of the second paragraph of his report. Eventually, as Spilsbury became accusatory regarding the fact that KB was a canceled customer, that she was receiving free service, and free backdoor service – all of which Melendrez claimed ignorance – Melendrez realized that the interview was no longer informational, but investigative. He stopped and asked for his union representative. Saul Lopez, the number 2 steward was summoned (Melendrez was the number 1). Melendrez wanted a business agent or someone from the Union's office. A lengthy discussion ensued,

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[20] In fact, a dispatcher once ordered Melendrez several years ago to put the bin of a non-customer into his hopper because he was not on the customer list. After doing so, the decision was reversed by Curtis Criswell, as the non-payer was Criswell's brother. Later, Criswell told Melendrez to pick up at that house even if it was not on the list. It's not clear what Criswell's authority was at the time. He is currently a route manager, and has been so for a number of years. Waingrow says Criswell was a district manager at the time of this incident.

In Melendrez' transcript of the Spilsbury interview of October 17, Melendrez goes into some detail regarding that procedure, even telling Spilsbury that Dispatch orders the drivers to throw the toters into the truck's hopper.

[21] Transcripts, with interlineal corrections the parties agreed upon, are in evidence as CPExhs. 24 and 25. I gave Respondent the opportunity to test the tape. It accepted the offer, but eventually chose not to have the test performed.

involving a telephone call to the Union and a conversation with business agent Martin Hernandez. Hernandez and Spilsbury argued about the efficacy of Melendrez having a specific representative. Spilsbury, correctly, advised that Melendrez couldn't insist on a particular representative, though in other respects, Spilsbury was incorrect. [22]

In any event, once Lopez arrived, Spilsbury zeroed in on Melendrez. During the conversation, Melendrez agreed that he had spent some time talking to KB at the street and admitted he had sometimes pulled her bin to the truck. But he still maintained he had been unaware that she was not a paying customer.

She had been a paying customer in the past. Before me, Melendrez explained that at least a year before he was fired (meaning at least October 2007, but probably some time before that), he had come to know KB one day when she had not put the bin on the street and from her car she asked him if he would go back and do a pickup. He did. As he did so, she went into the house and returned with a batch of brownies and gave him some. From that point on they were on speaking terms. At the time of the brownies reward she was a paying customer. It was not until November 2007 that her account went delinquent.

Spilsbury concluded that Melendrez was being inconsistent and therefore must be lying about not knowing her account was closed; indeed Spilsbury actually accused Melendrez of making things worse than they were by telling multiple stories. And it is true that at first Melendrez did not want to admit to the so-called free backyard service (which Spilsbury told him was very expensive), but which in fact is something Respondent doesn't really have a problem with, since it is good customer service.

Spilsbury's logic goes something like this: Melendrez supposedly is quite good at keeping track of the paperwork showing who the current customers are and who has been dropped. Melendrez wasn't forthcoming about his providing what Spilsbury regards as 'backyard' service. (What Melendrez did on some occasions was to pull the bin about 30 feet to

[22] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) established that an union-represented employee who reasonably believes that an interview might lead to discipline has the right to ask for representation by the union. Normally, the presence of steward meets the requirement and an employee may not insist on a particular representative (unless that representative is available). And, even though management does not have the obligation to inform the employee of that right, normally, management will advise the employee what the interview is about. It is at that point that the employee can decide whether he needs a union representative or not. Here Spilsbury never told Melendrez what the interview was about until there had been a general discussion about procedures. Even when the discussion turned to KB, his purpose was not clear. In my opinion, Spilsbury's approach denied Melendrez the opportunity to ask for representation in a timely way. Moreover, under *Weingarten*, once the union representative arrives, the employer is obligated to allow the employee and the union representative the opportunity to confer about the issue being investigated. Furthermore, while the union representative may not be disruptive of the interviewing process, he may offer knowledge or other evidence to assist and the employer may not tell him to be silent. Any review of the interview transcript demonstrates that Spilsbury did not offer Lopez the opportunity to discuss the issues with Melendrez and he cut Lopez off when Lopez, who drove the same route with the recycle truck, tried to point out that he was servicing KB's house as well. There are, therefore, three areas where Spilsbury deprived Melendrez of the full benefit of union representation: not properly informing Melendrez of his purpose, not allowing the two to confer and not permitting the steward to assist with first-hand knowledge about the customer in question.

curbside, taking less than a minute; he never went into the backyard. And although he first denied spending 10 or 15 minutes at the site, he later relented and agreed that he had done so. That meant to Spilsbury that Melendrez was a liar. Using the 'if he lied on one occasion, he lied in all' logic, Spilsbury concluded that Melendrez' relationship with KB was "special." He eventually told Waingrow, after also interviewing KB, that Melendrez was knowingly providing free waste removal to KB for either sex or money. Aside from the fact that he has made an unwarrantedly big leap from brownies to sex inside KB's house, conclusions not supported by his investigation, Spilsbury has his own credibility to be concerned about. [23]

As the Charging Party has ably observed in its brief, Spilsbury's report and the transcript are at odds. The transcript, of course is the best evidence.

Spilsbury's Report	Transcript of Interview
1. Melendrez stated he would never get out of his truck to provide backyard service unless the customer's name appeared on the route sheet indicating they had paid for that service	1. During the introductory portion of the interview, Melendrez said that he did provide courtesies for customers without backdoor service. Later: "Well, sometimes we do it with old people. With the people they (sic) [that] never do the service, like — I mean friendly people. They help you. Not many people outside the route say hi to you, and sometimes "Hey." "Yes, Man [Ma'am], please put it back over there."
2. Omitted from report that Melendrez had told him recycle driver Lopez services KB account on Fridays and he did not know she wasn't paying. When testifying Spilsbury first couldn't recall; after a break he said it would have been relevant only if Lopez was in front of KB's house for 10 minutes and was providing backdoor service.	A. [Melendrez] . . . What a coincidence; okay? There's a big coincidence right now. Q. [Spilsbury] What's a coincidence? A. Today's recycle. I've been talking to him [Lopez] about it. He said it was recycle. He did not know it wasn't a customer. It's on his route. He's saying it today. Q. For a year? A. For how long if she's there. She used to be a customer. If you don't even know on the route sheet . . . Q. Yeah, but—Okay. But you know—do you have—you take breaks in front of this person's house? Do you talk to her for ten, fifteen

[23] None of the surveillance efforts resulted in an observation that Melendrez went into the house, and only once did he pull the bin the 30 feet to the street. Plus, the neighbor John Matlock's complaint cannot be trusted either. Spilsbury never interviewed him and Lundquist had reported that Matlock said the male who supposedly went into the house was a young, clean-cut Hispanic, a description Melendrez does not fit. Matlock never identified Melendrez as the individual he had seen; in fact, Spilsbury deliberately chose not to interview Matlock. When Spilsbury learned that KB was a 29-year-old single woman, it might well have been that she had younger male friends of her own. That they might be of Hispanic heritage in Tucson would be unremarkable. Was Spilsbury afraid he might learn that a second man was going into the house? That would certainly undermine the neighbor's complaint because it would not support discharging Melendrez. From Spilsbury's point of view, Respondent was better off not knowing. Spilsbury had difficulty explaining why it was not a good investigative technique to have interviewed Matlock.

	hour—fifteen minutes in, on, on, while you're on your—while you're on your route? * * * A. [Melendrez] But I didn't know— Q. [Spilsbury] —Foolish A. —she wasn't paying. Q. Okay. That's why, that's why—That's when I real—I realize that you're, you're lying, and you know that full well. A. I didn't know she didn't pay. He, he also provides service for her, and did know she didn't pay? Q. No, no, no, no. I don't want Saul—I don't want to talk about Saul. Because he's not paying attention—he's not providing backyard service, which is very special, which is very expensive, without that person paying. And then, besides that, she isn't, she isn't even our customer! A. But I underst— Q. Besides— A. —I understood she was a customer. Q. Uh—a year ago. A. But I wasn't aware that she had finished— Q. Well, no! That's a, that's a, that's so, it's so big-time irresponsible on your part.

Spilsbury Testimony	Spilsbury Report	Transcript of interview
3. Said Melendrez admitted that he knew KB was a non-paying customer and had known if for over a year	Melendrez was asked if KB was a current customer and he stated she used to be a customer. He said it was his impression that she was still a customer but he was not sure if she appeared on his route sheet.	There are several places in the transcript where Melendrez denies he knew KB was not a customer in good standing; at some points Spilsbury can be seen to interrupt that answer. At no place in the transcript does Melendrez *admit* he knew KB was no longer a customer.

In addition, Spilsbury's contention that he did not know Melendrez was a union steward until Melendrez told him during the interview cannot be credited. Melendrez was perceived by all levels of management, corporate advisors in Houston to the first-line supervisors in Tucson as a strong union supporter – one who had become a strong union supporter after initially supporting the decertification movement. He had barked at Waingrove, had been in confrontations with Doyle and Clements and he had tape recorded statements at a pre-election meeting which were damaging enough to warrant a re-run election. He was the most visible

union adherent at West Ina Road. For Spilsbury to claim ignorance of Melendrez' status and the reason for the hunt which Waingrow had tasked him is simply disingenuous. He knew what he was supposed to do and did it. He gave Waingrow a paper reason to justify firing Melendrez.

Consistent with Spilsbury's version, Waingrow testified that he had never heard that Melendrez had contended that he had maintained to Spilsbury that he did not know KB was a paying customer.

On October 17, Waingrow suspended Melendrez, saying it was continuing to investigate the service at KB's house. That remark, too, is dishonest. No further investigation took place. A decision had been made at that stage. The only thing which remained was to conduct an exit interview with union officials present. That took place on November 5.

The discharge statement itself said:

> Eliseo knowingly provided free backdoor disposal service at 2780 Via Del Santo. He took breaks that were between 10 an 15 minutes at this location with the non-paying resident, whom he acknowledged being friends with, and would leave his truck idling in front of the house during those breaks. Eliseo understood he had a duty to determine if this customer was a paying customer, as he had done many times before. This customer has been cancelled since November of 2007. Eliseo admitted that he understood providing free (backdoor) service is in violation of company policy (theft/attempted theft of company property (Rule 4); dishonesty (Rule 5); misuse of company property (Rule 18); unauthorized use of company vehicle (Rule 19). as is leaving his vehicle idling and/or unattended in that residential neighborhood during his breaks (Rule 29(m)). He is also in violation of the company's code of conduct (unauthorized personal use of company property and improper dealings with client). These are severe violations that warrant termination under Article 5.02 (dishonesty, theft. failure to observe work rules and/or accepting compensation from customer).

Melendrez wrote his response in the appropriate blank: "I think this is not about free service to a customer. Is (sic) all about me because I'm the Union steward. I feel the statement is not true."

It is clear, I think, that at least some of the reasons for the discharge are overblown or are conclusions reached without evidence. Certainly many are conflated with one another. That is certainly true of the 'backdoor service' accusation. First, if it had truly been backdoor service Melendrez was supplying, he would have have returned the toter to its place next to KB's carport. And to say, as the form does, that he 'understood' that providing free service is a violation of company policy is only accurate regarding the existence of the policy – not in its application to KB, for whom Melendrez's knowledge of her non-paying status, on this record, is non-existent. In any event, it does not actually qualify as 'theft." Theft assumes that Melendrez has converted something to his own benefit – and such a benefit is indiscernible here. Maybe

KB was knowingly stealing the service, for she is the one who benefited, not Melendrez. [24] Melendrez at best gained some brownies and an occasional coffee, apparently consumed in his truck or next to it. Hardly the stuff of theft. [25] But in Spilsbury's eyes, whatever Melendrez' relationship with KB actually was, to him it was either sex or money, neither of which does his investigation come close to showing. Because of that, the accusation borders on the scurrilous. Had she been a paying customer, then it seems to me that Respondent would have let the matter pass entirely since Melendrez was simply maintaining a good business relationship with a client. [26] At most, Respondent, upon discovery, would have told him not to waste time on his route – indeed, he had little time anyway if he wished to reach the required level of service to qualify for his incentive pay.

Moreover, with regard to the accusation that Melendrez parked his truck for 10-15 minutes or so in front of KB's house, the evidence is fairly weak, at least insofar as the frequency of such conduct is concerned. Respondent itself has not ever acquired any evidence of such incidents. It only had Matlock's complaint and Melendrez' acknowledgement that he's done it a few times. Yet, Waingrow acknowledged on the record that no company rule prohibited Melendrez from taking his 10-15 break on a residential street or to converse with a resident while doing so. Even so, the discharge memo accuses him of leaving his truck unattended during the breaks, although there is no evidence whatsoever, except Matlock's suspicions voiced only in his complaint, that Melendrez ever left the truck unattended in front of KB's house. Spilsbury never confirmed it; nor did his investigator Lundquist. Indeed, Lundquist made a report that cast doubt on Matlock's ability to describe accurately what he was complaining about.

Analysis

It is quite clear that the General Counsel has made out a prima facie case that Respondent discharged Melendrez because of his union activity. He was perceived first as one who had switched sides and who had become a leader of the pro-union group, an active and

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[24] When KB's account was closed in late 2007, she paid the arrearage on-line. She later told Spilsbury that she was unaware of her 2008 cancellation since someone else was responsible for keeping the account up to date. Spilsbury considered this response to be a lie, but was it? It is entirely possible that if the account was supposed to be paid on-line by a third party (say, an ex-husband or a sympathetic parent) and she might not be aware of the status. Spilsbury never asked her who the third party was. At any rate, if that is true, it wouldn't be theft by her. Certainly Respondent allowed her to keep her trash bin as if her account was in good standing, even after it learned she still had one. If Respondent wanted her to resume her account, all it had to do was to have had the relief driver on July 24, remove the toter. At that point, it seems likely that a discussion would have occurred which might reasonably have led to resumption of the account and perhaps back payments. That would have most likely happened if indeed a third party was supposed to have been paying.

[25] See *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1005 (2004) where the Board said (citing a state statute) '"Theft," however, commonly involves knowingly obtaining something of value from someone else without authorization, or by threat or deception, and intending to deprive the other person permanently of the use or benefit of the thing of value.' In that case it noted that the employee had perhaps made a mistake, but it was not theft. The issue of 'knowingly' taking the thing of value is the key.

[26] The record is replete with instances where Respondent has permitted its staff to provide free trash services to others. Some of the instances may be regarded as simply a perquisite of employment, but there were clear abuses, too. No one ever got fired over it.

engaged steward. He was unafraid of facing off with corporate staff such as Clement or operations manager such as Doyle. And, of course, his testimony at the post-election hearing was a pivotal moment in Respondent's decision to agree to set aside the election and to extend the contract for the interim. He had supported his testimony with his presentation of the voice recording of what had actually been said in one of management's meetings leading up to the election. And he was so feared in such meetings, that Clement and Waingrow made the decision to bar him from one of the last, not because he was seen as disruptive, but because he had shown Clement he was armed with evidence about how local non-union waste collection companies actually handled their unrepresented employees' health insurance payroll deductions.

Moreover, after the election re-run stipulation was reached, Melendrez continued to perform his stewardship duties in a vigorous manner. He stood up for Gonzalez and Grijalva as they were discharged under peculiar circumstances. He helped Zarate re-integrate into the staff and he stood up to Doyle over an issue where he perceived Doyle as bullying Yepiz.

At some point, thereafter, it seems Respondent made Melendrez a target. But it was not until the Matlock complaints were made that Waingrow had any ammunition. When the complaints came he decided to use them as a reason to hunt Melendrez. Instead of discussing the complaint and the fact that KB was not a current customer, he embarked upon an extraordinary effort to obtain as much evidence as he could to fire Melendrez. He involved corporate security's Spilsbury and the two began a 90-day investigation which yielded very little more than what they knew on July 17.

Clearly Waingrow was not interested in simply dealing with a customer complaint or telling Melendrez's supervisor Don Ross to look into it. He wanted to run the matter himself. As Ross said, that approach was out of the ordinary. In fact, the response was disproportionate to the perceived problems. In the first place, a 90-day investigation was entirely unnecessary. In the second place, ordinary supervisory oversight would have led to confirming the facts concerning whether Melendrez knew KB was not a customer and whether there was some sort of inappropriate conduct occurring -- such as backyard service or a driver engaging in some kind of affair. Third, a simple removal order directed at KB's trash bin could have been issued shortly after Ross photographed about July 24; in fact an instruction to pick up any can at that address could have been given to either the July 24 relief driver or to Melendrez. Why did Waingrow decide to take the long, hard way to deal with the alleged problem instead of the easy, simple way? The only answer I can perceive is that he was looking for a way to fire Melendrez and make it stick. And the only reason he did that was because of Melendrez's union steward status, his union activities, his leadership abilities and because he had given damaging testimony before the Board at the post-election hearing.

Accordingly, I find that the General Counsel has demonstrated all the elements of antiunion discharge. Knowledge, timing, animus and a discharge are all present. Under the test of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) which the Supreme Court approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) the burden has shifted to Respondent to demonstrate that it would have fired Melendrez even in the absence of the elements of a prima facie case. See also *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999).

Recognizing its burden, Respondent presses its argument that Melendrez 'knowingly' provided free waste pickup service to KB. It asserts that the Melendrez is such a responsible driver, one who had previously reported non-payers and who assiduously went over his route sheets and kept himself aware of canceled accounts, that he could not possibly have been mistaken. [27] I am not persuaded.

First, KB was in good standing when she and Melendrez had their first encounter, resulting in her offering him brownies. That occurred sometime in 2007, but well before her payments stopped. She had been a customer for some time and he knew he had serviced that address regularly. There was no reason for him to be particularly aware of her status as time passed. Even assuming that he saw or could have seen a cut-off notice in late November 2007, it does not follow that she had been canceled. In fact, she made a payment about January 14, 2008. Drivers are aware that issues like this occur fairly frequently and are usually resolved in favor of continued service. As a result, their default position is, if a trash can is out for pickup they generally assume it is OK. And despite Respondent's record to the contrary, I have found that her trash bin was never collected by Doran Enterprises as instructed. Respondent is in large part responsible for the free service KB seems to have gotten. If it had wanted to stop servicing the account, it should have picked up her toter. Blaming Melendrez and treating the entire matter as his responsibility is, at the very least, a whitewash of its own neglect. Melendrez only did what garbage collectors do: he collected the garbage from the houses on his route. As the Board well knows, route driving like this tends to become rote and monotonous. Each driver learns the route by heart and follows the same routine at every stop — day after day.

Respondent's evidence that Melendrez deliberately provided free service to KB, and thereby engaged in 'theft' against it, is insufficient to rebut the prima facie case. Indeed, its extraordinary response to what amounts to no more than an ordinary customer compliance issue not only suggests, but leads to, the conclusion that it was trying to find a way to rid itself of a powerful union activist who stood in the way of going nonunion. That analysis applies not only to his role in campaigning against decertification, but his role in providing the evidence necessary to warrant setting the decertification election aside, and his role in forcing an extension of the collective bargaining contract. The problem was that Melendrez was a very good employee and in order to make the discharge stick, Waingrow (or perhaps someone above him in Corporate) decided to enlarge the evidence if it could. For that reason corporate security was brought in to try to find 'dirt' beyond the issue of free service and Spilsbury, the corporate security director, obliged. But since he could not find anything beyond what Waingrow already knew, Spilsbury provided some enhancements – mostly aimed at calling Melendrez and KB liars and accusing them of having a sexual relationship, something he knew

[27] Respondent points to the testimony of dispatcher Armando Carrillo who said that Melendrez was "very thorough" in checking his route book and he often called in to check on cutoff customers. He even left lists with the dispatcher to be checked for good standing.

Carrillo may well be correct. Nevertheless, his testimony does not make Melendrez any more responsible than any other responsible employee who was following instructions. In addition, it does not demonstrate that Melendrez knew KB had been cut off or that he intentionally provided her with free service. It only shows that he, like others, tried to be aware of new names on the cutoff list. If he missed KB back in January, he may well have missed her due to oversight, not something purposeful. Carrillo's testimony does not come close to conclusively settling the issue in Respondent's favor.

he could not prove. [28] But he accomplished Waingrow's aim – he supplied Waingrow with enough smoke to suggest that there had been a fire. And, on that basis, Respondent decided it was enough, and chose to make its stand.

In addition, Respondent makes an alternate argument, that it in good faith believed the evidence of misconduct to be true, seeking to rely on the Board's reasoning in *Yuker Construction*, 335 NLRB 1072 (2001) (discharge of employee based on mistaken belief does not constitute unfair labor practice, as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity). Here, Respondent knowingly overstated the evidence it is relying upon. It characterized the service to KB as theft when it was not and it converted an acquaintanceship into a scandal. Its own misconduct is clear. That approach creates its own imprimatur of desperation where none was needed. Rather than relying on evidence of good cause, it is evidence, combined with the other §8(a)(3) and (4) elements, of an illegal discharge. It was held long ago, well before the *Wright Line* test, that if a false reason is given for a discharge the falsity may be taken as evidence of illegal purpose. See, for example *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966) where the appellate court said at 470:

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. Nor is the trier of fact – here the trial examiner – required to be any more naïf than is a judge. [fn. omitted] If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal- an unlawful motive- at least where, as in this case, the surrounding facts tend to reinforce that inference.

Accord: *Holo-Krome Co. v. NLRB,* 954 F.2d 108 (2nd Cir. 1992)

Accordingly, I find that Respondent violated §8(a)(3) and (4) when it first suspended Melendrez on October 17 and then discharged him on November 5.

José Gonzalez

Respondent hired José Gonzalez in November 2004 and discharged him on June 14, 2008, in the wake of the agreement to set aside the decertification election. He had given testimony during the post-election hearing. He had stated his pro-Union stance quite clearly during his testimony. When asked if he was a union supporter he replied: "Yes, yes, yes. 100%." It also appears that he distributed union flyers at the yard's lunchroom and had vocally and visibly campaigned for retaining the Union as the employee representative. Dispatcher Carrillo was aware of his activities. In addition, a so-called 'Green Team' member, Gustavo Rubio, was aware of Gonzalez' pro-union sympathies having watched him campaign in the

[28] Spilsbury's claim that he did not know Melendrez was the principal union steward at the facility until the October 17 interview is rejected as implausible. Given the number of conversations he had with Waingrow and the fact that the Company was hunting for a reason to discharge Melendrez such a claim is empty.

lunchroom. [29] Given his own attitude toward unions, there is at least some likelihood that Rubio's knowledge was passed on to Respondent's Tucson management. Finally, he was part of a union team which visited employees at their homes during the campaign. It is not clear from the record whether anyone from management was aware of this aspect of his union activities.

During the post-election hearing, Gonzalez testified in support of the Union's objections to the election. He focused on what Jim Clements and Ernie Zuniga, the corporate officials who had been brought to Tucson, had said to him. He recalled that Clements told him he would "win" if the Union lost, because "You sir, you're going to make like sixteen [dollars per hour]." Gonzalez was then earning $13.70. This testimony amounted to a promise of benefit which would be sufficient to set aside the lection. Later, he testified that Ernie Zuniga told him about a week before the election that if the Union was out, he'd be making good money. However, when they discussed benefits Gonzalez expressed doubt that things would be as good. He says Zuniga responded that the Union would "cost us more" because the Company was not going to go into negotiations * * * …that the Company would not negotiate with someone who in the end would probably make us [Respondent] pay for insurance." When Gonzalez challenged Zuniga on the point by asking him how he knew, Zuniga said "We're the Company" and pounded on his chest. Gonzalez' testimony concerning Zuniga supported an objection relating either to the futility of collective bargaining or to a threat that the Company would refuse to bargain in good faith, also sufficient to set aside the election.

There can be no doubt that Respondent's Waingrow, as well as other officials, were aware of his testimony and were advised that the testimony was strong enough to warrant a re-run election.

On June 9, shortly after he left the yard in his truck to begin his second run of the day, Gonzalez was on Orange Grove Road approaching a traffic light at the La Cañada Road intersection. As the light was changing, the driver of the car ahead of him stopped more quickly than Gonzalez anticipated. Although he was able to stop his garbage truck quickly, his bumper touched the bumper of the car in front. The impact was enough to cause both drivers to examine the point of contact. After the examination, the woman driving the car determined that there had been no damage to her vehicle. Even so, they did exchange driver's license information. She then drove off and has never mentioned the incident to anyone at the Company. Respondent, though it possesses her contact information, has never spoken to her.

Gonzalez did not promptly radio the dispatcher to advise that he had been involved in the incident. He waited until he returned to the yard about 2 hours later to report it. At that time he informed his route supervisor, Doug Durga, what had happened; he also turned over the woman's name, address and driver's license number. Durga asked why Gonzalez had not called in from the site and Gonzalez replied that he did not think it was necessary since there had been no damage to the car. Gonzalez returned to work, driving his third run. Durga called Waingrow over and the two began a discussion about it during which Waingrow said he needed

[29] The Green Team is Respondent's name for a selected group of employees who respond to 'emergencies' around the nation. Some are storm damage and the like, but the Green Team has also been utilized in labor disputes to work during strikes and lockouts. Rubio had done so in Oakland, California in 2007, Los Angeles (October 2007) and a location in Wisconsin (August 2008).

to discuss the matter with the Risk Management department. When Waingrow told Durga he was turning the matter over to Risk Management, Durga thought that Risk Management's assessment would dictate whether Gonzalez would suffer any discipline.

Later that afternoon as Gonzalez was returning with his last load of the day, he encountered Durga who asked if he was finished for the day. Gonzalez said he was and Durga told him, "See you tomorrow." Gonzalez dumped his load and was in the process of cleaning the truck before parking it when Durga called him again to ask if he was done. He responded 'almost,' parked the truck and completed his daily paperwork. There, he discovered his timecard had been pulled and he was told he needed to go see Durga. In Durga's office he found himself in a meeting with Waingrow, Durga and some other route managers, as well as union steward Eliseo Melendrez. Gonzalez:

A He [Waingrow] was making -- he was asking me questions like what had happened and why I hadn't notified [the office].
Q Did you respond to those questions?
A Yes. I answered whatever I could.
Q What did you tell him, if you can recall?
A Well, I told him that I had not notified because nothing had happened. The lady had said nothing had happened to her car and, well, and the lady was going.
Q What happened next?
A But then he would say did you hit her, but did you hit her. And I would say, yes, yes, but it was very softly, it didn't hit. But he would say but you hit. And I was nervous and I would say, well, yes, yes. And they were all surrounding me and there were all the supervisors who were there and I got nervous.
Q What happened next?
A Well, he said he was going to suspend me for three days with pay for the investigation. And I told Eliseo to ask him if somebody had[~~n't~~] called, it (sic) [if] the lady had[~~n't~~] called. And he asked him. And then he said, but, no, but, all of a sudden, these people, they'll call, they'll call. And that was it. That's how he gave me the [suspension] paper.

[Edits by judge.]

At that time, Gonzalez was not asked to fill out an accident report. Unbeknownst to him, Durga had filled one out for him, though he never knew about it and certainly never reviewed it. It is unsigned by anyone. In the 'employee statement' blank, Durga wrote the single sentence: "The driver was going across Orange Grove Rd east bound behind several cars when the car in front of him stopped, our truck then hit the back of the car." There is one clear inaccuracy here — that Gonzalez was going across Orange Grove Road, when in fact he was driving on that road, not crossing it. But the biggest problem is the omission of facts which Gonzalez had told him. First, the driver of the car had stopped suddenly at the stoplight, forcing him to respond quickly. I think it is fair to infer that Gonzalez had expected the driver to continue through what was probably a yellow light and that he would have safely stopped on the red if she had continued on. Then Durga omits that Gonzalez told him the driver and Gonzalez had determined that it had only been a touching of bumpers without any damage. Furthermore she told Gonzalez that no damage had occurred and after the exchange of information, she said she was leaving and did so.

So the state of things when he arrived at the office was that Waingrow had a report that said his truck had 'hit the back of the car.' That sentence is both true and misleading. Hitting suggests damage. Durga knew there had been none so why did he truncate Gonzalez's oral report as he did? Why did he write anything at all? Wasn't it Gonzalez' responsibility to make the report? Surely it is the driver's responsibility to describe what happened, even if he were to

write it in Spanish. Indeed, Waingrow says that Durga told him "José had ran into a car," again suggesting Waingrow was under the impression from what Durga had said that damage had resulted.

I find that state of affairs to be peculiar. One of the first, if not the first, inquiries about an accident is whether anybody was hurt and the extent of the damage done. Why did Durga omit mentioning that to Waingrow? He knew no damage had occurred and he knew the other driver had left the scene on that basis. For him not to report those facts to Waingrow either orally or in the accident report he wrote for Gonzalez seems strange indeed.

Waingrow said that he did turn the matter over to Risk Management, but as far as he knows, that office never issued a report. At any rate, at the end of the meeting on June 9, Waingrow suspended Gonzalez pending further investigation. Even at that stage, Waingrow knew Gonzalez had not followed a company rule requiring that drivers involved in any accident or near-accident was to report it from the site, allowing a supervisor to review the scene and interview anybody if necessary. Despite that, he did not mention that rule to Gonzalez. In fact, on that day, Waingrow had two incidents that occurred where that rule was considered applicable. The second incident involved Victor Grijlava, whose separate case was settled as described above. By the end of the meeting of course, Waingrow clearly knew of Gonzalez' contention that the other driver had told Gonzalez there was no damage and that the contact had been a 'touch' or 'kiss,' not a 'hit' and that was the reason Gonzalez had not called it in, but had waited to report it on his return to the yard.

On June 13, a meeting [30] was conducted at Respondent's office concerning Gonzalez' bumper touching incident. [31] Waingrow, Durga, Curt Criswell and Marcelo Leyva [32] were present for management. Union official Efrain Sanchez was there with Gonzalez; Sanchez also served as Gonzalez' translator. The meeting was in some respects investigative. Gonzalez was asked to make a drawing of the incident. He did so. He also explained, as he had earlier to Durga, that since nothing had happened he waited until he returned to the yard to report it. In the course of this exchange Waingrow asked Gonzalez if he knew there had been a little girl in the back of the car and that the lady had taken her to the hospital. Waingrow's scenario was entirely fiction. No such thing had occurred. Indeed, no one from the Company, including Waingrow had ever been in contact with the driver. Certainly no little girl had been taken to the hospital. The question, filled with falsehoods, confused Gonzalez entirely. He knew no one else had been in the car. He could only stay silent.

After the investigative part of the meeting was over, Sanchez and Gonzalez departed (and after a similar meeting involving Grijalva and Sanchez), the management team is said to have 'voted' regarding whether Gonzalez should be discharged. Waingrow, acknowledging that the procedure was a little out of the ordinary, supported by his managers, nevertheless said that because Gonzalez had failed to immediately report the 'accident,' the appropriate remedy under the rule was discharge; no one dissented.

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[30] Actually two meetings of this nature were conducted seriatim; the second concerned Grijalva's situation.

[31] Earlier, On June 11, Gonzalez had given management a handwritten Spanish statement in which he described what happened. It does not differ materially from any other account he gave.

[32] Criswell and Leyva, like Durga, were route managers.

Respondent's accident policy which Gonzalez signed, insofar as it discusses timely reporting says: "Any accident not immediately reported to their supervisor will result in suspension and/or termination."

The Company Rules and Regulations state in the introduction:

> The following offenses are contrary to the best interests of the company and its employees. *Depending on the severity* of the offense, the frequency or unrelated offenses, and the employee's overall work record, the company *may elect* to implement any level of disciplinary action *up to and including immediate discharge*." (Italics supplied.)

It is followed by a list of 28 numbered rules (not counting number 29, which lists 15 sub-infractions). Rule number 15 is: "Failure to immediately report all personal injuries and accidents to your supervisor or a company official, including damage to the property of the company, an employee, customer or member of the public.

Any impartial reading of these two rules leads to the conclusion that Respondent has left itself a great deal of discretion in dealing with infractions of the sort Gonzalez supposedly committed. Gonzalez does not agree, however, that he had had an 'accident' under any fair definition of the word.

Rather than debating either the definition or the actual wording of the rule(s), Waingrow and his staff have decided that the rule is a 'zero-tolerance' decree. Therefore, they say, they really had no choice but to discharge Gonzalez because he waited 2 hours before reporting the incident.

I certainly understand Respondent's need for a rule requiring instant reporting of accidents. From its viewpoint, it is a regular target of property damage claims that it deems unwarranted. From its viewpoint, the quicker its managers learn about incidents, the quicker they can respond and preserve the evidence. It apparently has suffered claims filed against it by people who have said they would not and in circumstances where Respondent believed there had been no damage. I therefore have no problem with any rule requiring drivers to instantly report any incident out of the ordinary.

That observation, however, is not to say that the rule may be used as an excuse to engage in illegal activity, such as firing employees for activities protected by law or as a reprisal for their having given damaging testimony before the Board.

Respondent strongly argues that it assessed Gonzalez' situation fairly and applied the rule to him as it had applied it to others. The General Counsel and the Charging Party disagree. They assert that past practice demonstrates that Respondent has not usually treated such matters as being under a zero tolerance policy. Even route manager Durga at one point seems to agree, though counsel brought him back to Respondent's preferred version. Durga said that during safety meetings he has reminded drivers that they could be fired for not promptly reporting accidents:

> Q [By MR. BADOUX] Have you ever stressed that during safety briefings or the communications with drivers that it did not matter the extent of the damage caused?
> A Correct. Yes. Sorry.
> Q Have you indicated to drivers that report to you that they risk termination for failure to report?
> A Yes, I also let them, well, yes, I did say that, and I also said don't be that guy.

Q Have you explained to them what you mean by don't be that guy?
A Absolutely, yes.
Q And what do you mean by that?
A If you do not report it right away you *could be terminated*.
Q You could be or you will be terminated?
MR. MABRY: Objection. Asked [and answered].
JUDGE KENNEDY: Sustained.
Q BY MR. BADOUX: Do you -- is it your understanding that the policy calls for the individual to be terminated automatically for failure to report?
A Yes.
(Italics supplied.)

Route manager Leyva seems to concur as well. His testimony:

Q [By MS. MORA] Can you give us an idea how many times when you were a route manager you told drivers about the rule that they were to immediately report?
A [WITNESS LEYVA] As far as a number I can't give you a number, but I know that it was several times.
Q Did you ever communicate to any of your employees in Spanish that, the consequences of failing to report immediately?
A Yes.
Q And what would you tell them?
A That if they didn't report, that *more than likely they would be let go*, if it wasn't followed.
JUDGE KENNEDY: I'm sorry. I couldn't quite hear that?
THE WITNESS: That if they didn't report an incident that they *could possibly be let go*, or let go.
(Italics supplied.)

Waingrow, too, seemed to back off from a zero-tolerance approach when discussing another employee (Silva) who failed to report an incident, perhaps two incidents, yet received counseling instead of suspension or discharge. Waingrow:

Q BY MR. MYERS: We heard this morning, aside from this rule about failing to report, you would agree with me that the company generally adheres to a policy of progressive discipline for all other kinds of violations, would you not?
A [WITNESS WAINGROW] I don't know that's the general practice, no. There's different situations.
Q Okay. But, other than this failing to report violation, other rule violations would have to be evaluated based on their facts and circumstances, right?
A Even the failure to report would be investigated for circumstances --
Q Oh.
A -- so it's not separate.
Q So, normally, you would consider attenuating circumstances or mitigating circumstances in a failing to report violation?
A Just as we did with Mr. Silva, yes.

Based on these concessions, the Accident Policy's option for suspension or discharge together with the Company Rules and Regulations requiring managers to fairly weigh all the factors and extenuating circumstances involved in any incident, I conclude that the Zero Tolerance approach favored by Waingrow and his managerial staff as applied to Gonzalez does

not in fact exist. [33] It is a policy made for the incident of the day – a policy created on the spot. Indeed, it was made up in the same manner that Waingrow made up the story of the girl taken to the hospital.

Analysis

The General Counsel's prima facie case has been proven. Gonzalez was a union activist and he gave testimony which was regarded as sufficient to set aside a Board representation election. Moreover, Respondent discharged Gonzalez within 2-½ months of Respondent's forced admission of defeat concerning the election. Indeed, Respondent's behavior in pushing for the Union's ouster -- promise of a wage increase and a threat not to bargain in good faith – easily qualify as the required union animus. That animus has also been seen in the subsequent discharge of Melendrez and the extraordinary lengths it will to go to dig up dirt on a union activist to justify an illegally motivated discharge. Under *Wright Line*, supra, the next question is whether Respondent has presented evidence demonstrating that it would have fired Gonzalez even absent his being a union activist and a witness who had given testimony favorable to the Union.

As I view Respondent's evidence, I am unable to conclude that it has presented sufficient evidence to rebut the General Counsel's prima facie case. The bumper touching incident was pretty close to nothing at all. It is not as if Gonzalez did anything to conceal it. He did report it when he returned to the yard and he provided the lady's personal information, which Respondent could have used to follow up. (I really do not understand why someone from Respondent's office failed to do so. It would have been seen by the lady as evidence of a caring, concerned business. It would not have triggered a groundless lawsuit.) Clearly Respondent's rules cannot be read as a zero-tolerance mandate – they require a review of the surrounding circumstances and also require a proportional response to a rule violation. The severity of the offense is to be weighed against the employee's overall record and, after balancing the factors, a penalty "up to and including" discharge must be chosen. There is no obligation to choose the most severe. Indeed, the rules suggest otherwise.

Compare the Board's decision in *Associated Milk Producers*, 245 NLRB 1033 (1983), enfd., 711 F.2d 627 (5th Cir. 1983) where rules nearly identical to these were found top be discretionary. At 1034-1035 the Board made the following observation:

> Respondent argues that it fired Brower pursuant to a valid and written work rule that required its employees to report all damage to vehicles, however minor. Respondent's rule, however, did not mandate termination for violations of the rule. To the contrary, according to Respondent's "Driver's Manual," which contains an explanation of work rules and regulations, "Any driver failing to report an accident *could* be subject to immediate discharge."[note omitted] Elsewhere the manual provides that "[f]ailure to report an accident is cause for immediate dismissal."[note omitted] Nowhere does the handbook suggest that the

[33] The General Counsel and the Charging Party point to a variety of incidents where an employee was not discharged for failing to immediately report an accident. Some are more salient than others, such as driver Herrin's temporarily leaving the scene of an accident (knocking over a stop sign), asserting he could not find a place to pull over without blocking traffic but who did not report it until a dispatcher called him having heard of the incident from another source and telling him the police wanted him to return. Even so, the main observation to be made is that in all of the incidents Respondent's managers took the surrounding circumstances into account before making their decision not to discharge the employee.

> discipline imposed for failure to report an accident is not discretionary with management.[note omitted] Since the rule on its face is discretionary, the burden was upon Respondent to demonstrate that termination was the discipline uniformly imposed for violation of the rule. The evidence here suggests the contrary; when Brower asked Foster how many other employees had been fired for failing to report an accident, Foster replied, "None. But I'm firing you."

So the question is: What factors are present in this case which led Waingrow and his staff to be so severe with Gonzalez when they did not have to be? As far as I can tell, Gonzalez' work record is good; at least there is no mention of it in a negative way. If the only thing he did improperly in his 4-plus years of employment was to wait until he returned to the yard from his run to report a non-accident, one which had no repercussions, why was he discharged? Other drivers, whose transgressions were worse (Herrin, certainly), were not treated so sharply.

Again, I apply the logic of *Shattuck Denn Mining* and *Wright Line*, both supra:

> If [the trier of fact] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal- an unlawful motive- at least where, as in this case, the surrounding facts tend to reinforce that inference.

As the trier of fact, I find that the reasons advanced by Respondent for discharging Gonzalez do not withstand scrutiny. The reason, though true hypertechnically, was inflated in its application to an unreasonable level. [34] One does not discharge someone for a delay in reporting a triviality. Respondent did not discharge others whose transgressions involved delay in reporting (even complete failure to report) accidents. For that reason, I conclude that Respondent has exaggerated this near-incident to conceal the real rationale – to get rid of a union activist, one who had the temerity to testify against Respondent's interests. An overblown explanation does not rebut the General Counsel's prima facie case. See also *Arthur H. Fulton, Inc.*, 262 NLRB 980, 983 (1982), enfd. 701 F.2d 162 (4th Cir. 1983), where an employer, to justify a discriminatory discharge, overinflated a driver's decision to delay reporting a cracked sideview mirror for a few hours because he, like Gonzalez, thought it did not qualify as an accident. The Board rejected that employer's effort as unpersuasive. I am unpersuaded here, as well, for the same reason.

I therefore find that Respondent in suspending and subsequently discharging Gonzalez on June 13, violated §8(a)(3) and (4) of the Act.

Refusal to Provide and/or Delay in Providing Information

The complaint alleges that Respondent failed to respond to a letter written by the Union's attorney on November 26 which made twelve numbered demands for information, nine of which were specifically aimed at representing Melendrez during his grievance and arbitration. The other three demands also concerned the Melendrez grievance, but were aimed at the manner in which Respondent had disciplined and investigated similar supposed transgressions.

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[34] At worst Gonzalez' failure to call from the site was only a technical breach of the rule. Seizing on a technical rule breach to justify a discharge is unpersuasive and will not rebut the General Counsel's prima facie case. *University Townhouses Cooperative*, 260 NLRB 1381 at 1384 (1982).

Respondent denies that the material is relevant to a legitimate Union purpose, but that denial is rejected as the relevance is plain.

The parties have stipulated (in GCExh. 27) concerning the veracity of the claim. Specifically, they agree that on November 20, 6 days before the demand letter, that at a grievance meeting, Respondent turned over Melendrez' route sheets for an appropriate period of time, a black and white photo of KB's house, six pages of computer printouts, the ticket showing removal of KB's garbage can on January 11, several company rules, policies, responsibility and ethics statements, and Spilsbury's reports regarding his interviews of Melendrez and KB.

They also agree that that the Union's November 26 letter was received and that there was no formal response to it, but on January 27, 2009, Respondent's counsel hand-delivered a DVD showing the July 31 surveillance of Melendrez providing trash pickup service at KB's house (but not the videos of the other surveillance dates).

After some legal questions concerning the arbitrator's power to issue subpoenas, the Union sent another letter on March 13, 2009.

In addition, on March 19, 4 days before Melendrez' 3-day arbitration hearing opened on March 23, Respondent's counsel faxed some 94 pages of material. In addition, Respondent turned over some more material to the Union during the instant NLRB hearing before me. I shall not detail it here. The parties stipulate that they are in disagreement regarding whether the material not provided was the subject of the November 26 demand. They have also stipulated that the hearing record is still open for certain purposes and that it may be reopened for other purposes. In addition, the stipulation asserts that another Spilsbury report (on employee Rascon) was mentioned during the hearing, that the timing of the production of the document is unclear (the Union says it was not provided until after Spilsbury's cross-examination; Respondent says it left a copy for the Union on a hearing room table and it was available).

I do not deem it necessary to determine whether each item which was not produced or that was tardily produced meets the standard of relevance. It is clear to me that they all relate in some reasonable way to the issue of whether Melendrez was discharged for good cause or not. Nor is it necessary to parse the Union's second demand of March 13, 2009. What is clear to me is that Respondent does not take these demands very seriously. It may well have known of all these documents, or have become aware of them as the arbitration hearing approached. What it did not do was to err on the side of preferring production. Instead, it made its own judgment regarding what was relevant to the Union's case and, when it determined an item was on the margin, chose suppression. This it may not do. It is contrary to principles of good faith. If fact, here it would have an effect of tainting the arbitration process, something which §8(d) of the Act cannot countenance. Indeed, an arbitrator would no doubt regard such tactics as impeding his/her ability to render a fair decision if they were discovered.

Nevertheless, I recognize that at least some documentation was turned over which fit the Union's demand for information – even if some of the material preceded the demand. But there is no doubt that much of the material relevant to the union's representation of Melendrez was withheld or delayed to a point where the Union had no time to review or digest it. In that circumstance the delay rendered the material useless. Timeliness is of great importance in such matters. Nor did Respondent write to provide an explanation of why it was not providing what it was withholding.

The general rule is that an employer is obligated to provide the employees' statutory bargaining representative with information in its possession relevant to collective bargaining. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956); *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965); *Fafnir Bearing Co*., 146 NLRB 1582 (1964), enfd. 362 F.2d 716 (2d Cir. 1968). Furthermore, The Board in *Sheraton Hartford Hotel,* 289 NLRB 463, 463-464 (1988), said §8(a)(5) obligates an employer to provide a union with the requested information if there is a probability that the information would be relevant to the union in fulfilling its statutory duties as bargaining representative. When the requested information concerns wage rates, job descriptions, and other information pertaining to employees within the bargaining unit, the information is presumptively relevant. *Postal Service,* 332 NLRB 635 (2000). (same). That is particularly true as it relates to information which the union requires in order to evaluate the merits of a grievance. *Precision Fittings,* 141 NLRB 1034 (1963); *Washington Gas Light Co.*, 273 NLRB 116 (1984) and *Jacksonville Area Assn. for Retarded Citizens*, 316 NLRB 338 (1995).

Moreover, information that is "potentially relevant and will be of use to the union in fulfilling its responsibilities as the employees' exclusive bargaining representative" must be produced. *Acme Industrial Co.,* supra, at 435-436; *Conrock Co.,* 263 NLRB 1293, 1294 (1982). The requested information need not be dispositive of the issue for which it is sought but need only have some bearing on it. Information pertaining to employees within the bargaining unit is presumptively relevant. *Sheraton Hartford*, supra, and *Postal Service*, supra. [35]

Accordingly, I find that Respondent's approach here violated §8(a)(5) and (1) of the Act. An appropriate remedy will be provided.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As Respondent discriminatorily discharged José Gonzalez and Eliseo Melendrez, it must offer them reinstatement to their previous jobs, or if they are not available, to substantially similar jobs, and make them whole for any loss of earnings and other benefits they may have suffered. Respondent shall take this action without prejudice to their seniority or any other rights or privileges they may have enjoyed. Backpay, if any, shall be computed on a quarterly basis from the date of the discharge to the date Respondent makes a proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Furthermore, Respondent shall be required to expunge from its personnel files any reference to their illegal discharge. *Sterling Sugars*, 261 NLRB 472 (1982).

In addition, Respondent will be ordered to immediately provide whatever information it has not already provided and which complies with the Union's November 26, 2008 letter. It will also be order, *in futuro*, to respond to similar requests in a timely and complete manner, and not substitute its judgment for that of the Union in determining whether relevant material should be disclosed; in that way the integrity of the grievance-arbitration process will be maintained.

[35] Since no party has raised the issue, I do not here decide whether the material which should have been provided qualifies as pre-arbitration discovery. See *California Nurses Assn.*, 326 NLRB 1362 (1998) and cases cited.

The affirmative action shall also require Respondent to post a notice to employees announcing the remedial steps it has undertaken.

Based on the above findings of fact, I hereby make the following

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of §2(2), (6) and (7) of the Act.

2. United Food and Commercial Workers Union, Local 99 is a labor organization within the meaning of §2(5) of the Act.

3. At all times material herein the Union has been the exclusive representative of the employees working under the extended collective bargaining agreement between Respondent and the Union covering an appropriate bargaining unit of drivers and helpers at its West Ina Road yard near Tucson, Arizona, as more specifically described in the complaint.

4. On June 9, 2008, Respondent suspended its employee José Gonzalez and then discharged him on June 14, because of his activities on behalf of the Union and because he gave testimony in a Board post-election hearing; it therefore violated §8(a)(3), (4) and (1) of the Act.

5. On October 17, 2008, Respondent suspended its employee Eliseo Melendrez and then discharged him on November 5, because of his activities on behalf of the Union and because he gave testimony in a Board post-election hearing; it therefore violated §8(a)(3), (4) and (1) of the Act.

6. On November 26, 2008 in representing Melendrez during the grievance-arbitration process established by the collective bargaining contract concerning his discharge, the Union demanded information relevant to that representation and Respondent only partially complied and also delayed in turning over some of the sought material. By failing to fully and promptly comply, Respondent violated §8(a)(5) and (1) of the Act.

7. There is insufficient evidence to find Respondent committed any other unfair labor practices alleged in the complaint.

Based on the above findings of fact and conclusions of law, I hereby issue the following recommended

ORDER

Respondent, Waste Management of Arizona, Inc., dba Waste Management of Tucson, Tucson, Arizona, its officers, agents, and representatives, shall

1. Cease and desist from:

   a. Discharging or otherwise disciplining employees because they engage in activity protected by §7 of the Act, including engaging in activities on behalf of United Food and Commercial Workers Union, Local 99.

   b. Discharging or otherwise disciplining employees because they engage in activity protected by §7 of the Act, including giving testimony before the National Labor Relations Board.

c. Refusing to bargain in good faith by refusing to provide or failing to timely provide requested information relevant to the Union's representation of employees who are exercising their contractual right to pursue grievances, including the presentation of grievances to an arbitrator.

d. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

a. Within 14 days from the date of this Order, offer José Gonzalez and Eliseo Melendrez full reinstatement to their former jobs, dismissing, if necessary, any person hired as a replacement or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

b. Make José Gonzalez and Eliseo Melendrez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of the decision.

c. Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of José Gonzalez and Eliseo Melendrez, and within 3 days thereafter notify them in writing that this has been done and that the discharge will not be used against them in any way.

d. Immediately provide the information sought by the Union in its letter of November 26, 2008 to the extent it has not already done so.

e. Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

f. Within 14 days after service by the Region, post at its West Ina Road yard and office near Tucson, Arizona, copies of the attached notice marked "Appendix," [36] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since June 9, 2008.

[36] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

g. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the remainder of the complaint be dismissed.

Dated, Washington, D.C., December 28, 2009.

_____
James M. Kennedy
Administrative Law Judge

Appendix

Notice to Employees
Posted By Order of the
National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discipline you because you engage in activity protected by law, including engaging in activities on behalf of **United Food and Commercial Workers Union, Local 99**.

WE WILL NOT discharge or otherwise discipline you because you give testimony before the National Labor Relations Board.

WE WILL NOT refuse to bargain in good faith with **United Food and Commercial Workers Union, Local 99** by refusing to provide or failing to timely provide requested information relevant to Local 99's representation of employees who are exercising their contractual right to pursue grievances, including the presentation of grievances to an arbitrator.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed you by law.

WE WILL within 14 days from the date of the Board's order, offer **José Gonzalez** and **Eliseo Melendrez** full reinstatement to their former jobs, dismissing, if necessary, any person hired as a replacement or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make **José Gonzalez** and **Eliseo Melendrez** whole for any loss of earnings, plus interest, and other benefits suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the unlawful discharge of **José Gonzalez** and **Eliseo Melendrez**, and thereafter notify them in writing that we have done so and that their discharge will not be used against them in any way.

WE WILL immediately provide the information sought by **United Food and Commercial Workers Union, Local 99** in its letter to us dated November 26, 2008 to the extent we have not already done so.

WASTE MANAGEMENT OF ARIZONA, INC., d/b/a WASTE MANAGEMENT OF TUCSON

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue – Suite 1800

(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (206) 220-6284.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO, CALIFORNIA

WASTE MANAGEMENT OF ARIZONA, INC., d/b/a
WASTE MANAGEMENT OF TUCSON

and Cases 28-CA-21988
28-CA-22240

UNITED FOOD AND COMMERCIAL WORKERS
28-CA-22296
UNION, LOCAL 99

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